

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Review of the Commission's)
Regulations Governing Attribution)
of Broadcast Interests)
)
Review of the Commission's)
Regulations and Policies)
Affecting Investment)
in the Broadcast Industry)
)
Reexamination of the Commission's)
Cross-Interest Policy)

MM Docket No. 94-150

MM Docket No. 92-51

MM Docket No. 87-154

To: The Commission

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REPLY COMMENTS OF TRIBUNE BROADCASTING COMPANY

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To: The Commission

REPLY COMMENTS OF TRIBUNE BROADCASTING COMPANY

Tribune Broadcasting Company ("Tribune"), by its attorneys, hereby submits its reply to the Comments filed in the above-captioned Notice of Proposed Rulemaking (the "NPRM") issued on January 12, 1995.¹ In the NPRM, the Federal Communications Commission (the "FCC" or the "Commission") proposed to review, among other things, various rules and policies governing the attribution of broadcast media interests.

¹ See NPRM, MM Docket Nos. 94-151, 87-154 (released Jan. 12, 1995); Order, DA 95-1373, released June 16, 1995.

I. Introduction & Summary.

In its initial Comments in this proceeding, Tribune addressed three matters raised in the NPRM. First, Tribune urged that the Commission should not arbitrarily make the general determination that limited liability companies ("LLCs") are to be treated on a per se basis like limited partnerships because many LLCs are structured and function much more like corporations than partnerships. Tribune Comments at 6-12. Instead, Tribune advocated that the Commission regulate LLCs under procedures that recognize the varied structures under which LLCs operate. Id. at 12-14. Second, Tribune supported the retention of the Commission's single majority shareholder policy, demonstrating that the assumptions that supported the adoption of that policy have not changed. Id. at 14-20. Third, Tribune supported increasing the attribution benchmarks for voting stock from 5 percent generally and 10 percent for qualified institutional investors to at least 10 percent generally and 20 percent for qualified institutional investors. Id. at 20-25.

In reply to other comments filed in this proceeding, Tribune first advocates that an analysis of the comments in this proceeding that address the treatment of LLCs strongly supports adoption of regulation of LLCs like that proposed by Tribune. Tribune next urges the Commission to retain its single majority shareholder policy. Although at least one party submitted comments raising concerns with the policy and advocated its

elimination, Tribune demonstrates that those concerns do not justify elimination of a policy that encourages diversity of control of broadcast facilities without adversely affecting the goals underlying the FCC's multiple ownership rules.

II. LIMITED LIABILITY COMPANIES.

In its initial comments, Tribune provided detailed information concerning the varied structures and operation of LLCs and their regulatory treatment. See Tribune Comments at 7-14. In short, Tribune demonstrated that many, if not most, LLCs are structured and operated more like corporations than partnerships. Id. at 8-11. Tribune advocated that the FCC's rules should reflect the actual operation of these "manager form" LLCs rather than reflect the incorrect presumption that all LLCs are governed by "members." Id. at 11-14.

At least one other party submitted an articulate demonstration that supports the proposals made by Tribune for the treatment of LLCs. In its Comments, Fox Television Stations Inc. ("FTS"), in a manner similar to Tribune, recognized the importance of an LLC's "operating agreement" and discussed the two general forms that can be adopted by LLCs: "member" or "manager" governance. See FTS Comments at 19-21. As demonstrated by Tribune in its Comments, FTS's "manager form" of LLC most closely resembles the corporate form of operation. See

id.; Tribune Comments at 9-12. In such circumstances, where the actual structure and operation of an LLC is almost identical to the structure and operation of a corporation, it would be arbitrary and poor public policy to adopt regulations for treatment of LLCs that varied from the treatment of corporations. See FTS Comments at 21; Tribune Comments at 12-14.

Unlike Fox and Tribune, several parties advocated that LLCs should be treated like limited partnerships. See Comments of M/C Partners, the Blackstone Group, and Vestor Capital Partners ("M/C") at 31; Comments of Capital Cities/ABC, Inc. ("ABC") at 12-13; Comments of the California Public Employee's Retirement System ("CalPERS") at 17-18; Comments of the Freedom of Expression Foundation, Inc. ("FOE") at 13-14. In advocating treatment of LLCs as limited partnerships, however, some of these parties have erroneously assumed that all LLCs generally function like limited partnerships. See, e.g., M/C Comments at 31; ABC Comments at 12-13. Moreover, some suggest treating LLCs like limited partnerships because they are at the same time advocating that the FCC's insulation criteria for limited partners be relaxed, and made identical, or much more similar, to the treatment of corporations. See, e.g., FOE Comments at 11-12; CalPERS Comments at 17-18.

As Tribune and FTS already have shown, the parties who believe that all LLCs generally function like partnerships are incorrect. See Tribune Comments at 9-12; FTS Comments at 19-21.

LLCs very often are managed by officers under the direction of a board of directors exactly as a corporation would be managed, with the officers and directors having the same rights, duties and obligations as the officers and directors of a corporation. Id. The members of the LLC similarly would vote like shareholders of a corporation, having the same rights as shareholders, but with no authority or power to act for or on behalf of the LLC. Id. In these and many other respects, LLCs can be organized and operated just like corporations. Those LLCs that are organized and operated just like corporations should be regulated in the same manner as corporations. Id.

Similarly, the mere fact that many parties believe that the Commission should alter or relax its regulatory treatment of limited partnerships does not warrant treating all LLCs like limited partnerships unless the Commission amends its policies concerning limited partnerships. In originally adopting its attribution policies regarding limited partnerships, the Commission was concerned with the rights that limited partners could retain to exert control over general partners. See Attribution Order, 58 R.R.2d 604, 619-20 (1985). At the time it adopted these policies, the FCC concluded that certain rights held by limited partners, including the right to veto acts of the general partner or the right to act on behalf of the partnership, could be used by limited partners to exert significant influence over general partners. Id. Like most corporate shareholders, members of LLCs that function like corporations do not hold any

similar right to veto actions of the managers or other rights to act to bind the LLC.

Tribune does not disagree that the insulation provisions that are applied to limited partnerships are overly restrictive in certain respects and should be reviewed. See, e.g., Comments of Freeman Spogli & Co., Inc., at 5-12; M/C Comments at 21-25. In establishing attribution policies, the FCC should be much more concerned with the ability to exert a determining influence over decisions that are made by the licensee and should not be concerned with mere involvement in the licensee's affairs, or simple communication regarding investment activity. Only where a partner, stockholder or member can make programming, personnel or financial decisions should an interest be attributable. For this reason, Tribune agrees that the Commission should adopt many of the changes proposed to allow limited partners with nonattributable interests access to information concerning the operation of licensees.

III. THE SINGLE MAJORITY SHAREHOLDER EXCEPTION.

In its Comments, Tribune advocated that the FCC should retain its policy exempting from attribution all interests held by minority shareholders in a corporation controlled by a single majority shareholder. Tribune Comments at 14-20. Numerous parties similarly supported the retention of the single majority shareholder policy. See, e.g., FOE Comments at 6-7; FTS Comments

at 12-14; ABC Comments at 8; M/C Comments at 18; Comments of Turner Broadcasting Systems, Inc. ("TBS") at 10-18; Comments of CBS Inc. ("CBS") at 10-14; Comments of Westinghouse Broadcasting Company ("Group W") at 4-7; Comments of EZ Communications, Inc. ("EZ") at 2-5; Comments of National Association of Black Owned Broadcasters ("NABOB") at 13.

The reasons supporting the FCC's retention of the policy were plentiful. Various parties, in addition to Tribune, demonstrated that the policy was sound because minority shareholders do not generally have a degree of "influence" over the affairs of a licensee that has a controlling majority shareholder that warrants concern in addressing the multiple ownership rules. See, e.g., FTS Comments at 12-14; ABC Comments at 8; TBS Comments at 15-17; Group W Comments at 4-5. Parties also demonstrated that the policy furthers diversity of investment and control of broadcast stations. Id.; TBS Comments at 10-15; CBS Comments at 10-11; EZ Comments at 2-4; Comments of Silver King Communications, Inc. ("SK") at 9-10. Finally parties showed that abuses of the policy were not plentiful, and that such abuses could be remedied under existing Commission precedent. See, e.g., FOE Comments at 7; TBS Comments at 17-19; CBS comments at 11-12; Group W Comments at 6-7; EZ Comments at 5.

AFLAC Broadcast Group, Inc. ("AFLAC"), has advocated that the Commission eliminate the single majority shareholder exemption from attribution. AFLAC Comments at 15-19. Citing

specific fears of past, present and proposed sham business arrangements, predominantly by the network owners, AFLAC urges the Commission to eliminate the single majority shareholder exception. Id. at 15-18. AFLAC points to instances where network owners -- FTS, CBS, ABC and NBC -- have made or proposed to make investments in broadcast facilities that would not be attributable because a single shareholder possessed de jure control over the licensee; it then expresses concern over the coupling of their non-controlling equity interests with other connections -- programming or personnel -- to the licensee. Id. Primarily concerned with possible network power, and de facto influence and control, AFLAC seeks the complete elimination of the "single majority shareholder" exception to attribution, or, at the least, the establishment of a "de facto attribution" test. Id. at 15-19.

In its Comments, Tribune recognized that there is a natural tendency to be apprehensive of potential abuses of any exception to any of the FCC's rules, including the "single majority shareholder exception" to the FCC's attribution policies. Tribune Comments at 17. Nevertheless, Tribune also maintained that such fears do not support the total eradication of a rule that is sound from a legal and policy perspective. Id. at 15-20. AFLAC's concerns about network influence and abuse do not change this truth.

In adopting its attribution policies, the Commission sought to limit attribution to interests possessing a degree of "influence" such that the holders have "a realistic potential to affect the programming decisions of licensees." Attribution Order, 97 F.C.C.2d 887, 999, 1005 (1984). The Commission sought to make attributable interests that held a "degree of influence" sufficient "to undermine the multiple ownership rules." See KKR Associates, LP, 2 FCC Rcd. 7104 (1987); Lorimar Telepictures Corp., 3 FCC Rcd 6250 (1988). It is with this goal in mind that the Commission correctly concluded in 1984 that minority interest holders subject to the domination of a single majority shareholder are "unable to direct the affairs or activities of the licensees," and adopted the single majority shareholder exception to attribution. Attribution Order, supra, 97 F.C.C.2d at 1008-09.

In the overwhelming majority of circumstances, minority shareholders truly cannot exert any influence over a licensee, much less sufficient influence to warrant attribution. See Tribune Comments at 14-20; TBS Comments at 15-17. The Commission should not dispose of the "baby with the bath water" merely because of fears that some minority shareholders -- in AFLAC's postulate, the networks -- will have concocted arrangements that de facto may permit "them to direct the affairs or activities" of licensees. At most, the Commission, as it has in the past, can attempt to ascertain and punish abuses of the rules. See NBC, Inc., 6 FCC Rcd. 4882 (1991); NBC, Inc., 3 FCC Rcd. 3962,

3965 (MMB 1987) aff'd 3 FCC Rcd 4319 (1988); Coastal Broadcasting Partners, 7 FCC Rcd. 1432 (1992); Evergreen Broadcasting Co., 6 FCC Rcd. 5600, 5606-10 (1991).

In analyzing excessive minority shareholder influence over a majority shareholder's direction, the Commission should maintain the proper perspective on the routine nature of numerous business arrangements. As Tribune demonstrated in its Comments, convertible debt, warrants and other future rights are standard financing vehicles that are generally not subject to abuse. See Tribune Comments at 17. See also Dorothy S. Owens, 5 FCC Rcd. 6615 (1990); NBC, Inc., 6 FCC Rcd. 4882 (1991). For this reason, the Commission should continue to analyze the potential influence of minority shareholders over majority shareholders on a case-by-case basis, only finding the "single majority shareholder" exception inapposite in cases where a minority shareholder has the ability to make the programming, personnel and financial decisions that affect the operation of the stations involved, thus undermining the typical role of the majority shareholder.

IV. CONCLUSION.

For the reasons stated above, Tribune urges that the Commission continue its existing attribution policies or adopt new attribution policies that recognize the competitive nature of the market for delivering video programming and encourage further investment in that market. In adopting its rules, the Commission

should tailor its regulation to reflect the actual business practice of business entities rather than adopt regulations tailored to avoid any chance of potential abuse.

Specifically, Tribune first urges the Commission to adopt rules for LLCs that recognize the flexibility of the operation of LLCs as a form of business organization. Second, Tribune supports the retention of the single majority shareholder exception for minority holdings in corporations. Finally, Tribune supports increasing the stock ownership levels for attribution from 5 percent for voting stock and 10 percent for certain qualified institutional investors to 10 percent for voting stock and 20 percent for qualified institutional investors.

Respectfully submitted,

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